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Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

YAMHILL YAMAHA, INC.,

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK E. GRIFFIN
600 Crown Plaza
1500 SW First Avenue
Portland, Oregon 97201
(503) 224-5355
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly departed from the rule in Beacon Theatres, Inc. v. Westover, 359 U.S. 511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), in holding that mandamus is not appropriate relief for correcting the District Court's denial of trial by jury.

2. Whether plaintiff in an action removed from a court in which applicable state law does not require the parties to make express demand in order to claim trial by jury must file a demand for trial by jury, in spite of the express language in FRCP 81(c) that no express demand need be made.

LIST OF PARTIES

The parties to the proceedings below were petitioner Yamhill Yamaha, Inc.; respondent United States District Court for the District of Oregon, and Beaverton Motorcycles, Inc., dba Beaverton Honda, Yamaha Motor Corporation, USA, and Dean Collins, real parties in interest.

TABLE OF CONTENTS

Questions presented i

List of Parties..... ii

Table of Contents.....iii

Table of Authorities.....iv

Reference to Opinions in Reports.....v

Jurisdiction of the Supreme Court.....2

Constitutional and Statutory Provisions Involved 2

Statement of the Case.....5

Basis for Jurisdiction of the Court of Appeals.....9

Reasons for Granting the Writ

I. The Ninth Circuit's decision that mandamus is not an appropriate remedy to correct a trial court's improper denial of trial by jury conflicts with the decision of this Court and other Courts of Appeal.....9

II. The Ninth Circuit's decision has so far departed from the usual course of judicial proceedings or so far sanctioned departure by the District Court, as to call for an exercise of this Court's power of supervision.....17

CONCLUSION.....21

TABLE OF AUTHORITIES

U.S. Supreme Court Cases — Page

Beacon Theatres, Inc. v. Westover, 359 U.S. 511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).....i, 9, 10, 13, 14, 21

Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 891, 8 L.Ed.2d 44 (1962).....10, 13, 21

Federal Circuit Courts of Appeals Cases

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977).....8, 10, 11, 12, 15

Black v. Boyd, 248 F.2d 156 (6th Cir. 1957).....15

Bruce v. Bohanan, 436 F.2d 733 (10th Cir. 1971), cert. denied sub nom., Marathon Oil Co. v. Bruce, 403 U.S. 918, 91 S.Ct. 2227, 29 L.Ed.2d 694 (1971) 15

In re Don Hamilton Oil Co., 783 F.2d 151 (8th Cir. 1982).....15

Filmon Process Corp. v. Sirica, 379 F.2d 449 (DC Cir. 1967).....12, 15

First National Bank of Waukeesha v. Warren, 796 F.2d 999 (7th Cir. 1986).....15

General Tire and Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir. 1964), cert. denied, 377 U.S. 952, 84 S.Ct. 1629, 12 L.Ed.2d 498 (1964).....14

Houston North Hospital Properties v. Telco Leasing, Inc., 688 F.2d 408 (5th Cir. 1982).....19

Myers v. United States District Court, 620 F.2d 741 (9th Cir. 1980).....9, 11, 15

In re Turpentine & Rosin Factors, 238 F.2d 458 (5th Cir. 1956).....14

In re Union Nacional de Trabajadores, 502 F.2d 113 (1st Cir. 1974), rev'd on other grounds, 527 F.2d 602 (1st Cir. 1975).....10, 14

Yamhill Yamaha, Inc. v. Yamaha Motor Corp., et al, No. 7513 (9th Cir. Jan. 28, 1987).....1, 2

In re Zweibon, 565 F.2d 742 (3d Cir. 1970).....14

U.S. Constitutional Provisions

U.S. Const. amend. 7.....2

Statutes and Court Rules

28 U.S.C. 1254(1).....2

28 U.S.C. 1441(a).....5

28 U.S.C. 1446.....5

28 U.S.C. 1651.....9

28 U.S.C. 2101(c).....2

FRCP 38.....6, 7, 19

FRCP 39(b).....7

FRCP 81(c)..... i, 3, 6, 15, 16, 17, 19, 20, 21

Or.Rev.Stat. 46.180.....8

ORCP 50.....18

ORCP 51.....4, 18

Secondary Authorities

Judicial Conference of the United States, Advisory Committee's Notes to the 1963 Amendments to FRCP, reprinted at, 31 FRD 623 (1962).....21

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Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,

Respondent

PETITION FOR THE WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Yamhill Yamaha, Inc. respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on January 28, 1987.

REFERENCE TO OPINION IN REPORTS

The case was reported at Yamhill Yamaha, Inc. v. Yamaha Motor Corporation, et al, No. 86-7513 (9th Cir. 9/18/86)

Yamhill Yamaha, Inc. v. Yamaha Motor Corporation, et al, No. 86-7513 (9th Cir. 1/28/1987)

JURISDICTION OF THIS COURT

An order denying petitioner's Petition for Mandamus was entered on September 18, 1986. On November 11, 1986, the Court of Appeals entered an order granting rehearing. On January 28, 1987 an order denying the Petition for Mandamus was entered and the petition for rehearing was denied.

This Court has jurisdiction pursuant to 28 USC §1254(1). This petition was filed within 90 days of the entry of the order denying mandamus on January 28, 1987. 28 USC §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, amendment 7:

In suits at common law, where the

value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FRCP 81(c) :

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefore is

served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of notice of filing of the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

ORCP 51(C)

C. Issues of Fact; How Tried. The trial of all issues of fact shall be by jury unless:

C.(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury; or

> C.(2) The court, upon motion of a party or on its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.

STATEMENT OF THE CASE

On March 15, 1985, petitioner filed an action in the Circuit Court of the State of Oregon for the County of Yamhill. This action alleged violations of Oregon franchise and anti-price discrimination laws by Yamaha Motor Corp., U.S.A. This action was removed by Yamaha Motor Corporation to the United States District Court for the District of Oregon on April 15, 1985, pursuant to 28 USC §1441(a) and 1446.

On September 26, 1985, petitioner filed a second action in the Circuit Court of the State of Oregon for the County of Yamhill. This second action alleged

violations of Oregon franchise laws by Yamaha Motor Corp., U.S.A. and violations of Oregon's anti-price discrimination laws by Yamaha Motor Corp., U.S.A., Beaverton Motorcycles, Inc., and Dean Collins. This case was removed to the United States District Court for the District of Oregon on November 11, 1985. On December 9, 1985, this case was consolidated with the earlier case which had been removed.

On July 3, 1986, after notice by the District Court that trial was not scheduled before jury, petitioner filed a Demand for Jury Trial. Defendant Yamaha Motor Corporation, U.S.A., filed a Motion to Strike the Jury Trial Demand and on August 14, 1986, Judge Helen J. Frye granted that Motion. Judge Frye held that FRCP 38, and not FRCP 81, which governs procedure in removed actions, applied and that the

demand for jury trial was not timely under FRCP 38(b).

Petitioner filed a Petition for Preemptory Writ of Mandamus in the United States Court of Appeals for the Ninth Circuit on August 22, 1986. That petition asked that the Court of Appeals issue a preemptory writ of mandamus to compel the District Court to vacate the order which struck the demand for jury trial and to designate the consolidated cases upon the court's docket for jury trial. Petitioner asked that the Court of Appeals decide the following issue:[1]

> Whether plaintiff in a removed action must file a demand for jury trial where State law applicable in the court from

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[1] A second issue was presented to the Court of Appeals. Petitioner sought mandamus to compel the District Court to exercise its discretion pursuant to FRCP 39(b). Petitioner here does not seek certiorari with respect to that issue.

> which the case is removed does not require that express demand be made.

On September 18, 1986, the Court of Appeals issued an order denying the writ of mandamus. The Court of Appeals relied on an Oregon statute, ORS §46.180, applicable only to Oregon district courts and not to the Circuit Court from which the actions had been removed. On September 30, 1986, Petitioner filed a timely Petition for Rehearing which addressed this point. The Petition for Rehearing was granted on November 14, 1986. On January 28, 1987 the Court of Appeals issued an order denying the petition for writ of mandamus and the petition for rehearing. The Court of Appeals stated "The petition does not satisfy the guidelines for granting mandamus relief", citing Bauman v. United States District Court, 557 F.2d 650,

654-55 (9th Cir. 1977). The Court of Appeals did not state specifically why mandamus was not an appropriate remedy.

BASIS FOR JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals had jurisdiction pursuant to 28 USC §1651. A writ of mandamus is an appropriate remedy where the right to trial by jury has been denied. Beacon Theatres, Inc. v. Westover, 359 US 500, 511, 79 S.Ct. 948, 957, 3 L.Ed.2d 988 (1959); Myers v. United States District Court, 620 F.2d 741, 744 (9th Cir. 1980).

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit decision that mandamus is not an appropriate remedy to correct a trial court's improper denial of trial by jury conflicts with the decisions of this Court and other Courts of Appeals.

This Court has "emphasize(d) the responsibility of the Federal Court of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury...." Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 891, 897, 8 L Ed 2d 44 (1962). It is a well established rule that mandamus is an appropriate procedure to correct a violation of this fundamental right. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 3 L.Ed.2d 988 (1959).

In spite of this rule, the Court of Appeals applied criteria for granting mandamus generally, which it had enunciated in Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977),[2] to

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[2] Like the First Circuit, the Ninth Circuit previously had suggested that rigid mandamus requirements must be relaxed where the issue of denial of trial by jury has been raised. Compare In re Union Nacional

this jury trial issue. These criteria are:

> (1) Does the petitioner have other adequate means, such as direct appeal, to obtain the relief he desires?
>
> 2) Does the District Court's order damage the petitioner in a way not correctable on appeal?
>
> (3) Is the District Court's order clearly erroneous as a matter of law?
>
> (4) Is the District Court's order an often repeated error and does it therefore manifest a persistent disregard of the federal rules?
>
> (5) Does the District Court's order raise issues of first impression and create new and important problems?

The Ninth Circuit's elliptical reference to Bauman and its refusal to utilize mandamus as a remedy are inconsistent with the clear direction of this Court

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de Trabajadores, 502 F.2d 113, 114-115 (1st Cir. 1974) to Myers v. United States District Court, 620 F.2d 741, 744 (9th Cir. 1980)

that the mandamus remedy should be used to correct the denial of trial by jury. Under the Bauman criteria, a denial of a right to jury trial would seldom, if ever, be the proper subject for mandamus relief.[3] For example, one must assume that the denial of trial by jury is not a common occurrence, and would not fall within the ambit of the fourth criteria. Similarly, the third criteria is not one which should determine whether the mandamus remedy is available. For example, in Filmon Process Corp v. Sirica, 379 F.2d 449, 450-51 (DC Cir. 1967), the District of Columbia Circuit Court of Appeals stated:

> The United States Attorney, opposing the petition for mandamus, suggests that we may deny the writ without ourselves

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3 The order in this case does not state which of the guidelines were not satisfied. Indeed, the Ninth Circuit's reference to Bauman is indirect.

deciding that there is no right of trial by jury since the question is at least debatable and the writ issues, to compel the trial court to exercise its jurisdiction at law, only in "a case plainly triable at law by jury."

Although recent Supreme Court decisions do not speak explicitly to this point, it is a fair inference that even on an application for an extraordinary writ for pre-trial relief the Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury, regardless of whether the quetion [sic] is a close or complicated one, and that the Court would not welcome a doctrine whereby a party's constitutional right to jury trial was trammeled in fact because a court of appeals determined that the issue was doubtful and that it need not and would not decide whether or not the party had the right of trial by jury. See, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). Other circuit courts of appeals have taken the view that the denial of a jury trial in contravention of a party's constitutional rights automa-

> tically presents "such an exceptional situation as to call for the issuance of a mandamus to review the ruling."

The petition for mandamus clearly satisfies the remaining three criteria of Bauman.

In following the rule set forth in Beacon Theatres, nine Courts of Appeals which have addressed the issue have held that mandamus is remedy which should be used to correct the denial of the right to trial by jury. In re Union Nacional de Trabajadores, 502 F.2d 113 (1st Cir. 1974), rev'd on other grounds, 527 F.2d 602 (1st Cir. 1975); Higgins v. Boeing Co., 526 F.2d 1004 (2nd Cir. 1975); In re Zweibon 565 F.2d 742 (3rd Cir. 1970); General Tire and Rubber Company v. Watkins, 331 F.2d 192, 194 (4th Cir. 1964), cert. denied, 377 U.S. 952, 84 S.Ct. 1629, 12 L.Ed.2d 498 (1964); In re Turpentine & Rosin Factors,

238 F.2d 458 (5th Cir. 1956); Black v.Boyd, 248 F.2d 156 (6th Cir. 1957); Myers v. United States District Court, 620 F.2d 741, 744 (9th Cir. 1980)[4]; Bruce v. Bohanan, 436 F.2d 733, 735-36 (10th Cir. 1971), cert. denied sub nom., Marathon Oil Co. v. Bruce, 403 U.S. 918, 91 S.Ct. 2227, 29 L.Ed.2d 694 (1971); Filmon Process Corp v. Sirica, supra, (D.C. Cir. 1967).

Two Circuits have held that denial of trial by jury is an issue which should not be resolved by mandamus. First National Bank of Waukeesha v. Warren, 796 F.2d 999 (7th Cir. 1986). In re: Don Hamilton Oil Co., 783 F.2d 151 (8th Cir. 1982)

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[4] The Court of Appeals decision here appears to conflict with its ruling in Myers that mandamus is appropriate relief for correction of denial of the right to trial by jury. In Myers, the Court referred to Bauman in support of the granting of a writ of mandamus in a removed action. In Myers, as in this case, the District Court had misinterpreted FRCP 81 (c).

The decision of the Court of Appeals here not to utilize mandamus to correct the denial by the District Court of the right to jury trial in a removed action is squarely in conflict with law of the Second Circuit. In Higgins v. Boeing Co., 526 F 2d 1004 (2d Cir. 1975), the Second Circuit granted mandamus and compelled the District Court to place consolidated removed cases on the jury docket. The Court of Appeals, in interpreting FRCP 81(c), held that timely demand for trial in removed cases was governed by state, as opposed to federal, law and granted mandamus to correct the error.

The decision below disregards authority that mandamus should be granted where the right to trial by jury has been denied. Certiorari should be granted to correct this deviation from this Court's prior

rulings, and to resolve the apparent conflict between Circuits.

II.

> The Ninth Circuit decision has so far departed from the usual course of judicial proceedings, or so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

FRCP 81(c) clearly states that parties in a case which has been removed from a state court need not make a demand for jury trial after removal, if state law does not require the parties to make such express demand.

FRCP 81(c) states, in relevant part:

> "If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury they need not make demands after removal unless the Court directs that they do so within a specified time if they desire to claim trial by jury."

Oregon law applicable in the court from which the cases were removed does not require that a party make an express demand for trial by jury, ORCP 50 and 51, and the United States District Court did not direct that the parties make such demand within a specified time.

ORCP 51C states, in relevant part:

> C. Issues of Fact; How tried. The trial of all issues of fact shall be by jury unless:
> (1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury; or
> (2) The court, upon motion of a party or on its own initiative, finds that a right of trial by jury of some or all of these issues does not exist under the Constitution or statutes of this state.

There was no stipulation for trial without jury; the state court from which the actions were removed made no findings

that the right to jury trial did not exist. Thus, when the case was removed Petitioner had not waived the right to a jury trial. The right remained and no demand was necessary after removal.

Those Courts of Appeals which have considered this issue consistently have construed Rule 81(c) strictly. In Houston North Hospital Properties v. Telco Leasing, Inc., 688 F.2d 408, 409-410 (5th Cir. 1982), the Fifth Circuit interpreted FRCP 81(c) as follows:

> Jury trial requests in removed cases are governed by [FRCP] 81(c). The rule sets out three ways in which jury trials may be had. First, a Rule 38 demand may be served by the non-petitioner within 10 days after notice of filing of the removal petition. Second, an express demand previously made in state court preserves the jury trial and need not be repeated. Third, if state law would accord a jury trial without express demand, the parties are entitled to a jury trial and need not make the separate demand required by Rule 38 unless the district judge directs them to do. (Emphasis added)

In Higgins v. Boeing Co., supra, 526 F.2d at 1006-1007, the Second Circuit stated:

> "Because this was a removed cause the question of jury trial demand was governed not by Rule 38 but by Rule 81(c). That refers us to the state law applicable in the court from which the case is removed to determine whether that law "does not require the parties to make express demands in order to claim trial by jury." If it does not, then plaintiffs need not have made a demand here until directed to do so by the court. [Emphasis added, footnote omitted.]

These cases are consistent with statements made by the Advisory Committee on Rules. In referring to the 1963 amendment to FRCP 81 which is at issue here the Committee stated:

> In order still further to avoid unintended waivers of jury trial, the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to a jury trial without making an express demand, he need

> not make a demand after removal. However, the district court for calendar or other purposes may on its own motion direct the parties to state whether they demand a jury, and the court must make such a direction upon the request of any party. [Emphasis added]

Judicial Conference of the United States, Advisory Committee's Notes to the 1963 Amendments to FRCP, reprinted at, 31 FRD 623, 652-654 (1962).

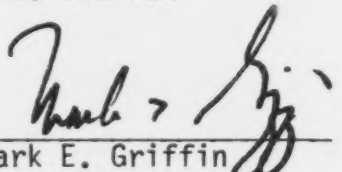
CONCLUSION

The decision by the Court of Appeals squarely conflicts with the principal stated in Beacon Theatres, Inc. v. Westover, supra, and Dairy Queen, Inc. v. Wood, supra, that mandamus should issue where the right to jury trial has been denied. Because the Ninth Circuit has denied the use of this remedy to petitioner, it has permitted the clear misconstruction of FRCP 81(c). The importance of these issues to judicial administration,

together with the conflicts between the rulings below and those of other Courts, including this Court, warrant that a Writ of Certiorari be granted.

Respectfully submitted,

MARK E. GRIFFIN

By: 

Mark E. Griffin
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YAMHILL YAMAHA, INC., an Oregon corporation,	)	No. 86-7513
Petitioner,	)	DC# CV-85-648-FR Oregon (Portland)
v.	)	
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,	)	ORDER
Respondent,	)	
and	)	
YAMAHA MOTOR CORPORATION, U.S.A., a California corporation, et al.,	)	
Real Parties in Interest.	)	

Before: WRIGHT, WALLACE and SCHROEDER, Circuit Judges

The petition for writ of mandamus is denied. The district court properly granted defendant's motion to strike Yamhill's demand for jury trial as untimely. See Or. Rev. Stat. 46.180, Fed. R. Civ. P. 81(c) and 38(d).

MoCal 9/8/86

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YAMHILL YAMAHA, INC., an Oregon corporation,	)	No. 86-7513
Petitioner,	)	DC# CV-85-648-FR Oregon (Portland)
v.	)	
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,	)	ORDER
Respondent,	)	
and	)	
YAMAHA MOTOR CORPORATION, U.S.A., a California corporation, et al.,	)	
Real Parties in Interest.	)	

Before: WRIGHT, WALLACE and SCHROEDER, Circuit Judges

The petition for writ of mandamus is denied. The petition does not satisfy the guidelines for granting mandamus relief. See, Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

The petition for rehearing is denied.

Misc. 12/29/86

No. 86-1644

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BRIEF IN OPPOSITION OF REAL PARTIES IN INTEREST

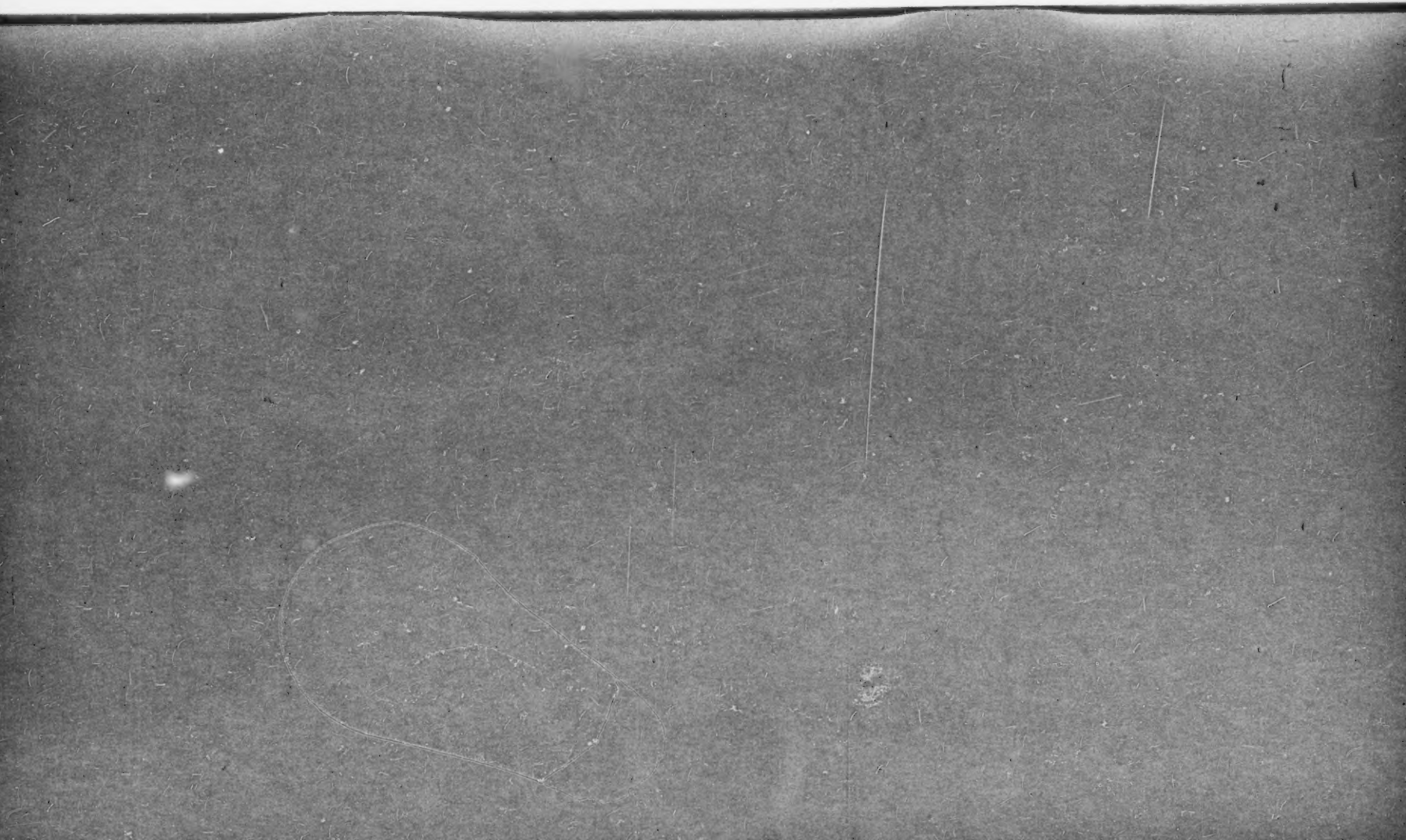
PETER C. RICHTER
WILLIAM H. WALTERS*
MILLER, NASH, WIENER,
HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858

Attorneys for
Defendants Dean
Collins and Yamaha
Motor Corporation,
U.S.A.

JOHN H. HOLMES
HOLMES, DEFRANCO &
SCHULTE
811 S.W. Front Avenue
Portland, Oregon 97204
(503) 223-4131

Attorneys for
Defendant Beaverton
Motorcycles, Inc.

*Counsel of Record



QUESTION PRESENTED

Did the United States Court of Appeals for the Ninth Circuit abuse its discretion under the All Writs Act, 28 USC § 1651, in denying the petition of the present petitioner for a writ of mandamus?

TABLE OF CONTENTS

	Page
Question Presented	i
Statement of the Case	2
Reason for Denying the Writ	5
1. The decision of the Ninth Circuit does not conflict with decisions of this Court	5
2. The decision of the Ninth Circuit is not "squarely in conflict with law of the Second Circuit" or other circuits	7
3. The Ninth Circuit properly concluded that this case "does not satisfy the guidelines for granting mandamus relief"	12
4. The district court correctly concluded that petitioner waived its right to jury trial	13
Conclusion	15

TABLE OF AUTHORITIES

Page

Bauman v. United States Dist. Court, 557 F2d 650 (9th Cir 1977) 12

Beacon Theatres v. Westover, 359 US 500 (1959) 5, 6, 11,12

Black v. Boyd, 248 F2d 156 (6th Cir 1957) 10

Bruce v. Bohanon, 436 F2d 733 (10th Cir 1970) 10

Dairy Queen v. Wood, 369 US 469 (1962) 6,11, 12

Filmon Process Corp v. Sirica, 379 F2d 449 (DC Cir 1967) 11

First Nat. Bank of Waukesha v. Warren, 796 F2d 999 (7th Cir 1986) 11

General Tire & Rubber Company v. Watkins, 331 F2d 192 (4th Cir 1964), cert denied, 377 US 952 (1964) 9

Higgins v. Boeing Co., 526 F2d 1004 (2d Cir 1975) 7, 8

In re Don Hamilton Oil Co., 783 F2d 151 (8th Cir 1986) 11

In re Turpentine & Rosin Factors, 238 F2d 458 (5th Cir 1956) 10

In re Union Nacional de Trabajadores, 502 F2d 113 (1st Cir 1974), rev'd, 527 F2d 602 (1st Cir 1975) 8

In re Zweibon, 565 F2d 742 (DC Cir 1977) 9

Myers v. United States Dist. Court, 620 F2d 741 (9th Cir 1980) 10

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BRIEF IN OPPOSITION
OF
REAL PARTIES IN INTEREST

STATEMENT OF THE CASE

Respondents[1] supplement petitioner's statement as follows:

(1) In petitioner's first state court action, the named defendant removed the matter to federal court prior to filing an answer.

(2) At the time petitioner's first action was filed and removed, the rules for the Yamhill County Circuit Court for the State of Oregon, petitioner's chosen forum, required that a party wishing to

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1 The present respondents are the real parties in interest and were denominated as such before the Ninth Circuit.

Respondent Yamaha Motor Corporation, U.S.A., is a wholly owned subsidiary of Yamaha Motor Co., Ltd., and has as a non-wholly owned subsidiary Yamaha Motor Manufacturing Corporation of America. Beaverton Motorcycles, Inc., has no parents, non-wholly owned subsidiaries, or affiliates.

have a trial by jury notify the court of this in writing.

(3) Petitioner did not notify the state court in writing that it wished to have a trial by jury.

(4) In petitioner's second state court action, the defendants removed the matter to federal court prior to filing answers.

(5) As stated by the district court judge, petitioner did not file a notice of jury demand in the two consolidated actions before the federal court until "seven to eight months after the last pleading directed to the action." (Petitioner's Supplemental Appendix, App. C.)

(6) In response to petitioner's motion for rehearing, the Ninth Circuit issued an Order stating that "[p]etitioner's motion for rehearing presents a

serious question regarding the necessity of filing a notice of demand for jury trial in the Circuit Court of Oregon for the County of Yamhill," and requested that respondents ("Real Parties in Interest" before the Ninth Circuit) answer.

(7) Respondents argued to the Ninth Circuit:

> (a) Mandamus was not appropriate because a substantive right to jury trial was not contested; rather, the question was simply whether petitioner, by its conduct, had waived its jury trial right, and
>
> (b) The district court had correctly decided the waiver issue, either because (1) Fed R Civ P 38(b) applies and petitioner failed to request a jury trial within the period specified by that rule, or

because (2) the Yamhill County Circuit Court required petitioner to make an express demand in order to claim a trial by jury, the court rule had the force and effect of state law, and, therefore, petitioner waived its right to trial by jury by failing to make a timely demand in federal court. Fed R Civ P 81(c).[2]

REASON FOR DENYING THE WRIT

1. The decision of the Ninth Circuit does not conflict with decisions of this Court.

Petitioner argues that the decision of the Ninth Circuit "squarely conflicts" with the decision of this Court in Beacon Theatres v. Westover, 359 US 500 (1959),

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2 Respondents further argued that petitioner could not revive his extinguished right by the device of filing a second, substantially identical action. On this point, petitioner has not argued to the contrary.

and Dairy Queen v. Wood, 369 US 469 (1962). Petitioner is mistaken. Beacon Theatres and Dairy Queen protect the constitutional right to trial by jury in cases where parties join legal and equitable claims arising out of the same transaction. Such is not the case here. Justice Black, the author of both Beacon Theatres and Dairy Queen, observed in the latter opinion that "Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." 369 US at 473 (emphasis added). And the only issue which petitioner seeks to pursue here is whether it has "timely and properly demanded" a trial by jury.

2. The decision of the Ninth Circuit is not "squarely in conflict with law of the Second Circuit" or other circuits.

When petitioner states that "[i]n Higgins v. Boeing Co., 526 F2d 1004 (2d Cir 1975), the Second Circuit granted mandamus and compelled the District Court to place consolidated removed cases on the jury docket" (Petition, p. 16), petitioner misstates the holding of Higgins. Higgins remanded the cause "to the sound discretion of the district court * * *." 526 F2d at 1007 ("Our order * * * grant[s] the petition to the extent of directing the district court to consider the question whether, in the exercise of its sound discretion, the trial shall be by jury.").

In general, circuit courts in mandamus proceedings have responded to waiver and related issues on the particular

facts of the cases before them. By way of example, the cases cited by petitioner at pages 14-15 are briefly noted:

In re Union Nacional de Trabajadores, 502 F2d 113 (1st Cir 1974), rev'd, 527 F2d 602 (1st Cir 1975) (per curiam), took the position that in a criminal matter "any denial of mandamus should be made only if either the case has not been adequately presented or there is no such right to a jury trial." 502 F2d at 116. The court found that "the issue ha[d] been adequately raised," and, on the merits, held that 18 USC § 3692 "requires criminal contempt proceedings stemming from alleged violations of a NLRA injunction to be tried before a jury * * *." 502 F2d at 121.

Higgins v. Boeing Co., 526 F2d 1004 (2d Cir 1975) (per curiam), featured a case removed from New York state courts where New York law required a written demand for trial by jury--which had not been complied with--but also allowed the state

trial court discretion to relieve a party from the effect of failing to make a timely demand if no undue prejudice would result. The circuit court held that Fed R Civ P 81(c) should be read to accommodate the state court's discretion and, accordingly, directed the district court to exercise its sound discretion whether to allow a jury trial.

In re Zweibon, 565 F2d 742 (DC Cir 1977) (per curiam), held that a prior opinion of the court effectively amended the previous pleadings and raised an issue for the first time, and therefore the timeliness of a jury trial demand should be judged in terms of the date of the return of the court's mandate to the district court.

General Tire & Rubber Company v. Watkins, 331 F2d 192 (4th Cir 1964), cert denied, 377 US 952 (1964), held that a "notice" provided under 35 USC § 282 was not a pleading within the meaning of Fed R Civ P 38(b).

In re Turpentine & Rosin Factors, 238 F2d 458 (5th Cir 1956) (per curiam), denied a writ of mandamus because the denial of a jury trial by the trial court involved, or may have involved, exercise of its discretionary power.

Black v. Boyd, 248 F2d 156 (6th Cir 1957), held that a bankruptcy trustee, by filing a cross-claim in an equitable action, did not waive a right to jury trial.

In Myers v. United States Dist. Court, 620 F2d 741 (9th Cir 1980), the Ninth Circuit held that where a party in a removed action had made an untimely express demand for a jury trial in state court, but where the state court had exercised its discretion and granted the demand, the party had made a demand "in accordance with state law" for purpose of Fed R Civ P 81(c), and no further demand was required in federal court.

Bruce v. Bohanon, 436 F2d 733 (10th Cir 1970) held that the plaintiffs' claim that defendant

misappropriated business and trade information sounded in tort and was triable to a jury. The court further held that the plaintiffs had not waived their right to a jury trial by their counsel's statement of uncertainty whether the claim was legal or equitable in nature which had been made prior to making a jury trial demand.

Filmon Process Corp v. Sirica, 379 F2d 449 (DC Cir 1967) held that plaintiff's allegations did not entitle it to a jury trial.

First Nat. Bank of Waukesha v. Warren, 796 F2d 999, 1006 (7th Cir 1986), denied a writ for mandamus where on the facts of the case before it there was "no possibility of issue or claim preclusion" as had been prominent in Ex Parte Simmons, 247 US 231 (1918), Beacon Theatres, and Dairy Queen.

In re Don Hamilton Oil Co., 783 F2d 151, 152 (8th Cir 1986) (per curiam), denied the petition because "of the questionable nature of the legal issue presented * * *."

3. The Ninth Circuit properly concluded that this case "does not satisfy the guidelines for granting mandamus relief."

The Ninth Circuit cited Bauman v. United States Dist. Court, 557 F2d 650 (9th Cir 1977), which articulates guidelines for granting mandamus relief. Petitioner does not contest the general appropriateness of the Bauman guidelines. Petitioner objects only that these guidelines are not appropriate where petitioner seeks "to correct a violation of [the] fundamental right" to trial by jury. The district court, however, has not ruled that petitioner lacks a right to trial by jury. The district court has determined rather that petitioner waived this right. Thus this is not a case like Beacon Theatres and Dairy Queen where a court has refused to acknowledge a right to trial by jury by giving first hearing

to equitable claims with the resultant likelihood that a party's legal claims will be barred by issue or claim preclusion.

4. The district court correctly concluded that petitioner waived its right to jury trial.

The district court reached the correct result for either of two reasons. Petitioner's initial state action was removed to federal court prior to the filing of an answer. The district court correctly reasoned that "where a civil action is removed to federal court before all necessary pleadings have been served, Fed R Civ P 38 governing jury demands in ordinary federal civil actions is applicable." (Petitioner's Supplemental Appendix, App. C.)

Alternatively, as argued in detail to the Ninth Circuit, the Oregon law applicable in the court from which plaintiff's initial state action was removed required the parties to make an express demand for a jury trial. This requirement was stated by the local court rules of plaintiff's chosen forum, and these rules had the force and effect of state law. Petitioner did not demand a jury trial in state court. Therefore, petitioner waived its jury trial right by failing to make a timely demand in federal court. Fed R Civ P 81(c).

CONCLUSION

For the several reasons given, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Peter C. Richter
William H. Walters
MILLER, NASH, WIENER,
HAGER & CARLSEN
111 S.W. Fifth Avenue
Portland, Oregon 97204

Attorneys for Defendants
Yamaha Motor Corporation,
U.S.A., and Dean Collins

John H. Holmes
HOLMES, DEFRANCQ & SCHULTE
811 S.W. Front Avenue
Portland, Oregon 97204

Attorneys for Defendant
Beaverton Motorcycles,
Inc.

Attorneys for Real Parties
in Interest

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CLERK

No. 86-1644

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

YAMHILL YAMAHA, INC.,

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,

Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK E. GRIFFIN
600 Crown Plaza
1500 SW First Avenue
Portland, Oregon 97201
(503) 224-5355
Counsel for Petitioner

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

YAMHILL YAMAHA, INC., an Oregon corporation; Plaintiff, v. YAMAHA MOTOR CORPORATION, U.S.A., a California corporation; BEAVERTON MOTORCYCLES, INC., an Oregon corporation, dba BEAVERTON HONDA; and DEAN COLLINS, Defendants.	Filed August 14, 1986 Civil No. 85-1930-FR ORDER
YAMHILL YAMAHA, INC., an Oregon corporation; Plaintiff, v. YAMAHA MOTOR CORPORATION, U.S.A., a California corporation; Defendant/ Counterclaim Plaintiff, v.	Civil No. 85-648-FR

ANDREW ERIC LaLACK III; ANDREW LaLACK, JR.; and MARK B. GREGSON;

Counterclaim-Codefendants.

Before: Frye, Judge

The matter before the court is the defendants' motion to strike plaintiff's notice of demand for trial by jury.

BACKGROUND

Plaintiff filed two actions in the Circuit Court of the State of Oregon for the County of Yamhill, which were subsequently removed to this court. Plaintiff alleges defendants engaged in price discrimination and coerced plaintiff into purchasing products.

The first action, Civil No. 85-648 was removed on April 15, 1985. Defendant filed an answer and counterclaim on May 8, 1985 and plaintiff replied to the counterclaim on September 3, 1985. On September 28, 1985, plaintiff filed the second action, Civil No. 85-1930, which was removed to this court on

November 5, 1985. On November 6 and 8, 1985, defendants filed answers.

On June 10, 1986, plaintiff filed a notice of demand for trial by jury.

DISCUSSION

Defendants move to strike plaintiff's jury demand on the grounds that the demand is untimely and that plaintiffs have therefore waived any right to jury trial.

Fed. R. Civ. P. 81(c) governs the applicability of the federal rules in removed actions. It provides in relevant part:

> (c) Removed Actions.
>
> These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. . . . If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not

> make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

However, where a civil action is removed to the federal court before all necessary pleadings have been served, Fed. R. Civ. P. 38 governing jury demands in ordinary federal civil actions is applicable. See e.g. Kalmanovitz v. G. Heileman Brewing Co., Inc., 610 F. Supp. 1319, 1327 (D.C. Del. 1985). Rule 38(b) provides:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

The notice of jury demand in these actions was filed seven to eight months after the last pleading directed to the action. Failure to file within the time provided constitutes a waiver of the right to trial by jury. Fed. R. Civ. P. 38(d).

IT IS HEREBY ORDERED defendants' motion to strike plaintiff's jury demand is GRANTED.

DATED this 14th day of August, 1986.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge